No. 88-72

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PINNEY DOCK & TRANSPORT CO.,
Petitioner,
v.
NORFOLK & WESTERN RAILWAY CO., *et al.*

LITTON INDUSTRIES, INC., *et al.*,
Petitioners,
v.
NORFOLK & WESTERN RAILWAY CO., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF C.D. AMBROSIA TRUCKING CO., DAVID W. REANEY AND REANEY DOCK COMPANY, AND ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY/CODAN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF C.D. AMBROSIA TRUCKING COMPANY, DAVID W. REANEY AND REANEY DOCK COMPANY, AND ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY/CODAN CORPORATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amici, David W. Reaney and Reaney Dock Company, C.D. Ambrosia Trucking Co., Inc., and Erie-Western Pennsylvania Port Authority/Codan Corporation, hereby

move for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari.*

Amici are two docks and a trucking company that were gravely injured by the same conspiracy challenged by the petitioners. *Amici* filed antitrust suits against the conspirators; two of *amici's* three suits were brought in district courts in the Sixth Circuit. Although *amici's* cases have been consolidated with several others for pretrial proceedings in a federal district court in the Third Circuit, there is a possibility that the Sixth Circuit's decision could control the two suits initially filed in the Sixth Circuit. Also, the Sixth Circuit's decision could conceivably receive precedential effect regardless of where suit was filed. *Amici* thus have a vital interest in the outcome of this case.

Additionally, *amici's* participation in this case will aid the Court because *amici* will present matters that are essential to resolution of the petition for a writ of certiorari. A number of those matters have not been put before the Court by the petitioners or have been treated cursorily by them. The matters presented by *amici* show that the Sixth Circuit's decision conflicts with decisions of this Court and federal courts of appeal, thwarts the explicit intent of Congress, and presents legal and economic questions of national importance.

Because *amici* have a vital interest in the outcome of this case and will present matters of great importance to certiorari, including matters not presented or not presented fully by the petitioners, it would be appropriate for *amici* to be permitted to file the accompanying brief in support of the petition for a writ of certiorari.

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* The Pinney and Litton plaintiff-petitioners have consented to the filing of *amici's* brief in support of certiorari. Their letter of consent has been forwarded to the Clerk. The defendant-respondents have refused to consent to the filing of *amici's* brief, thereby making this motion necessary.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the motion to file the accompanying brief in support of the petition for a writ of certiorari.

Respectfully submitted,

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BRIEF OF C.D. AMBROSIA TRUCKING COMPANY, INC., DAVID W. REANEY AND REANEY DOCK COMPANY, AND ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY/CODAN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICI

Amici are two docks and a trucking company that were gravely injured by the same conspiracy challenged by the petitioners in this case. *Amici* filed three antitrust suits against the conspirators, and two of those suits were

brought in district courts in the Sixth Circuit. Although *amici's* cases are presently pending in a federal district court in the Third Circuit, having been consolidated with several others for pretrial proceedings, there is a possibility that the Sixth Circuit's decision in this case could control *amici's* two suits initally filed in the Sixth Circuit. Also, the Sixth Circuit's decision could conceivably receive precedential effect in *amici's* cases regardless of where they were filed. *Amici* thus have a vital interest in this case.

INTRODUCTION

This case deals with the handling and transportation of iron ore that moved from Lake Erie to steel mills located in Ohio, Pennsylvania and West Virginia. Control over iron ore movements lay in the hands of a group of railroad companies, some of which are respondents in this case. In order to retain their control over iron ore handling and transportation, these railroads engaged in one of the most destructive conspiracies ever uncovered in the history of the antitrust laws. To protect their outmoded methods for handling and transporting iron ore from Lake Erie, for over twenty years this group of powerful railroads conspired to prevent the introduction of better and cheaper methods of handling and carrying ore. The conspirators thereby caused the cost of handling and transporting ore to be inflated by hundreds of millions of dollars and destroyed the economic health of persons and companies that sought to introduce modern technology. The conspiracy was carried out through hundreds of secret meetings, phone calls, letters and memoranda. So blatant was the conspirators' disregard of antitrust laws that their actions were memorialized in thousands of pages of documents ultimately discovered in the defendants' files.

When the conspiracy was finally uncovered, four of the railroads pleaded *nolo contendere* to a criminal indictment. During the criminal proceedings, a federal dis-

trict judge and the Court of Appeals for the District of Columbia Circuit held the conspirators' actions were subject to the antitrust laws. Moreover, a document inadvertently produced during discovery revealed that Conrail's antitrust counsel told that company's Board of Directors that "The type of conduct [at issue]—that is a conspiracy to monopolize and to prevent independent market entry—has never been exempt from the antitrust laws by reason of ICC regulation." However, contrary to the rulings of the District of Columbia judges and the conclusions of Conrail's counsel, the Sixth Circuit has now held the conspiracy immune from any significant civil liability to the parties it gravely injured or destroyed.

In its opinion, the Sixth Circuit issued an immunity ruling directly contrary to the D.C. Circuit's prior holding, conceded that its ruling on the *Keogh* issue conflicts with other courts of appeal, misapplied this Court's decision in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), ignored this Court's ruling in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), and thwarted the explicit intent of Congress in the Reed-Bulwinkle Act, 49 U.S.C. § 10706.

In these circumstances this case warrants review. There are direct conflicts between the Sixth Circuit and other courts of appeal. The Sixth Circuit's opinion is inconsistent with rulings of this Court. The legal and economic questions are of national importance—to the antitrust laws, to competitive conditions and a sound economy, and to carrying out the will of Congress.

STATEMENT OF THE CASE

A. The Railroads' Conspiracy

Mud-like iron ore was long transported to Lake Erie railroad docks in vessels called bulkers. These boats were unloaded by huge cranes, called huletts. Each hulett

had a claw that dipped into bulkers to grab loads of ore, which were deposited on the dock or in rail cars. The ore then moved inland to steel mills via railroad "line hauls" that were exceptionally lucrative for the railroads.

In the 1950's, ore began to be shipped in pelletized rather than mud-like form. Pellet ore can be carried in technologically advanced boats which unload themselves by an internal conveyor belt and a boom that deposits the ore on the dock. Because they unload themselves, these "self unloaders" rendered unnecessary the expensive hulett cranes used by railroad docks to unload bulkers. Moreover, self unloaders could be received at non-railroad docks that did not have hulett cranes. Because the non-railroad docks (called private docks) did not need to invest in huletts, they could charge much less than railroad docks.

The railroads viewed self unloaders and private docks as a serious threat. Self unloaders and private docks endangered the railroads' monopoly over the business of providing dock services for ore, and thereby threatend the revenues the railroads received from this business and the value of the railroads' investments in hulett cranes. They also endangered the railroads' monopoly over inland transportation of ore and the huge revenues derived from that transportation. For if self unloaders brought ore to private docks, then trucks, which were refused access by the railroads to railroad-owned docks, would be able to compete with railroads for the inland transportation of ore by carrying it from private docks.

The railroads therefore agreed to forestall the use of self unloaders and to preclude private docks and trucks from entering the iron ore trade. Beginning in 1956, and continuing for approximately twenty-four years, the railroads conspired to achieve their exclusionary purposes. The steps taken to implement the conspiracy included:

(1) Railroads refused to file "commodity" line haul rates for movements of ore from private docks. Ore unloaded at private docks thus could be moved inland by rail only at "class" dates, which were two to four times higher than the commodity line haul rates applicable to ore movements from railroad docks. In fact, no ore was ever moved at the expensive "class" rates because, as the railroads knew, it was economically infeasible to do so. Being denied commodity rates and commodity rate service, private docks were effectively precluded from competing with railroad docks.

(2) Despite economic savings realized because self unloaders unloaded themselves instead of having to be unloaded by hulett cranes, the railroads refused to lower their dock handling rates for self unloaders.

(3) Railroad docks refused to handle self unloaders.

(4) Railroads refused to sell or lease land to companies or governmental entities that intended to establish private docks.

(5) Railroads prohibited trucks from picking up ore at railroad docks, or levied economically prohibitive charges against such pick-ups.

(6) Railroads harassed truck movements of ore.

(7) When any railroad indicated it might abandon the conspiracy and act independently by handling self unloaders, by granting a commodity line haul rate to a private dock, or by leasing or selling land for a private dock, other railroads pressured it to adhere to the conspiratorial agreements and threatened retaliation if it acted independently. The other railroads thereby forced continued adherence to the conspiracy.

The railroads' conspiratorial purposes and agreements were kept secret by use of "informal" unpublicized meet-

ings, unpublished proposals, private phone calls, and private memoranda and letters that sometimes carried specific admonitions of secrecy. By these secret means the railroads agreed upon the conspiracy's goals of forestalling self unloaders and barring private docks and trucks. By the same secret means the railroads decided to take such implementing steps as agreeing not to grant a commodity line haul rate to private docks, agreeing not to sell or lease land for use as a private dock, agreeing not to grant lower dock handling rates to self unloaders, agreeing to harass truck movements of ore, and applying pressure and threatening economic retaliation against any railroad that indicated it might abandon the conspiracy.

B. Proceedings In the Instant Case And the Criminal Case

Because of a falling out between two of the conspirators, the conspiracy was uncovered in 1980. The instant civil cases were then brought, thousands of pages of incriminating documents were obtained from the defendants' own files, and the trial judge wrote lengthy opinions detailing the facts and finding the defendants subject to the antitrust laws. In addition, a criminal indictment was filed by the federal government. The senior trial judge in that case ruled the defendants' actions were not immune from the antitrust laws, and the Court of Appeals for the D.C. Circuit affirmed. Four defendants, three of which are respondents in this case, pleaded *nolo contendere* rather than face trial.[1]

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[1] The four were Conrail, the Baltimore & Ohio Railroad, the Chesapeake & Ohio Railroad, and the Bessemer & Lake Erie Railroad. One defendant, the Norfolk & Western, went to trial and obtained a directed verdict of acquittal because the trial judge felt the government failed to show it had joined the conspiracy. The trial judge in the *Pinney* case thereafter reached an opposite assessment of the evidence against the Norfolk & Western, and the question is *sub judice* in consolidated actions being heard in Philadelphia.

REASONS FOR GRANTING THE WRIT

I. By Immunizing The Conspirators' Denial of Commodity Line Haul Rates to Private Docks, The Sixth Circuit Has Acted In Conflict With the D.C. Circuit and Has Contravened Clear Congressional Intent

The most important method used to exclude private docks from handling ore was the defendants' refusal to grant them commodity line haul rates. The Sixth Circuit, however, has held the exclusionary denial of rates immune from the antitrust laws, and has thereby relieved defendants from most of their civil damages liability to private docks.

The Sixth Circuit's immunity ruling directly conflicts with the decision of the District of Columbia Circuit in the criminal case. *United States v. Bessemer & Lake Erie Railroad Co.*, 717 F.2d 593 (D.C. Cir. 1983). There the indictment listed nine categories of acts in furtherance of the conspiracy. 717 F.2d at 597. Three of the nine categories involved denial of commodity line haul rates to private docks,[2] and the indictment was upheld in its entirety by the D.C. Circuit. Thus the D.C. Circuit has held the conspiratorial denial of line haul rates subject to antitrust liability, while the Sixth Circuit has held the denial immune from antitrust liability.[3]

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[2] The three categories of such denial were that the defendants refused to grant commodity line haul rates for movements of ore from private docks, removed private docks from tariffs providing commodity line haul rates on ore, and amended commodity line haul tariffs to provide that they applied only from railroad docks.

[3] The Sixth Circuit unsuccessfully tried to distinguish the D.C. Circuit opinion, saying "We do not find our holdings necessarily at odds with those in *U.S. v. Bessemer* involving entirely different considerations of the role of the United States in the criminal enforcement of the Sherman Act." Petitioners' Appendix at 28a-29a, n.15. However, any such "different considerations of the role of the United States in criminal enforcement" have nothing to do with whether the conspiratorial denial of a line haul rate is immune

The Sixth Circuit's decision also conflicts with this Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). There the Court ruled that, even if an act is lawful when committed in isolation, it is not lawful when committed as part of a broader scheme: "[A]cts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." 370 U.S. at 707. Here the denial of commodity line haul rates to private docks was one of several means used to implement a broader overall conspiracy to bar private docks, trucks and self unloaders. Even assuming the denial of rates would be lawful standing alone, it was unlawful as part of defendants' overall scheme.[4]

The Sixth Circuit's ruling also contravenes the will of Congress in two ways the Circuit did not even discuss. First, when enacting the Reed-Bulwinkle Act, 49 U.S.C. § 10706, Congress explicitly made clear that agreements limiting service were not to be immune from the antitrust laws. Representative Bulwinkle said:

> *the Act would not make possible carrier agreements to limit and reduce service to the public.* S. 110 as originally introduced and as passed by the Senate authorized the approval of agreements as to matters of service. Objection was made to such agreements . . . . 94 Cong. Rec. 4033 (1948) (extension of remarks). (Emphasis added.)

To obtain passage of the Act, said Bulwinkle, its supporters

> proposed that the bill be amended *so as to restrict its application to rate conferences and nothing else.*

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from antitrust laws. If the denial of rates is immune, it is immune regardless of whether a case is criminal or civil, and if it is not immune, it lacks immunity regardless of whether a case is criminal or civil.

[4] The Sixth Circuit did not mention *Continental Ore.*

> This having been done by amendment in the House, subsequently accepted by the Senate, the *bill no longer applies to agreements as to service matters*, . . . 94 Cong. Rec. 4033 (1948) (extension of remarks). (Emphasis added.)

The lack of immunity for agreements to limit service is fatal to the conspiracy, for there could be no commodity line haul *service* without commodity line haul *rates*. By agreeing to deny commodity line haul *rates* to private docks, the defendants were agreeing to deny them commodity line haul *service*. Such denial of service is not immune under Reed-Bulwinkle.

Furthermore, because the defendants knew that no ore ever moved via the much higher priced class rate service, by denying *commodity* rates and service to private docks the defendants were *de facto* denying them *any* service. Again, such denial is not immune.

Second, the Sixth Circuit thwarted Congress' intent that there be no agreements limiting a railroad's right of independent action and Congress' intent that no railroad coerce another into agreeing not to exercise its right of independent action. The Congressional intent was explicitly stated in the Reed-Bulwinkle Act itself [5] and in its legislative history.[6]

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[5] The Commission "may not approve an agreement . . . establishing a procedure for determination of a matter through joint consideration unless that Commission finds that each party to the agreement has the absolute right under it to take independent action either before or after a determination is made under that procedure." 49 U.S.C. § 10706(d)(2).

[6] The Senate Report says the House bill was changed "to make it unmistakably clear that no agreement between carriers establishing a procedure for the determination of any matter through joint consideration shall be approved unless assurance is provided that each carrier party to the agreement shall have the free and unre-

Here the railroads' secret agreements contained no provisions according any right of independent action. Rather, the railroads agreed that no carrier would act independently, and they brought economic pressure to bear on any railroad that considered granting a commodity line haul rate to a private dock. None of this was even mentioned by the Sixth Circuit.

II. The Sixth Circuit's Ruling On Keogh Concededly Conflicts With Decisions of Other Circuits and Is Inconsistent With This Court's Decision in Square D

The Sixth Circuit ruled that the *Keogh* doctrine bars suits not just by shippers, but by competitors. The Circuit conceded that this ruling is contrary to other circuits. Petitioners' Appendix at 17a.

The Sixth Circuit also seriously misapplied this Court's recent decision in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), which the appeals court relied upon. In *Square D*, the present *amici*

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strained right to take independent action." Senate Report No. 44, p. 15, 80th Cong., 2d Sess. (1948).

Representative Bulwinkle made clear that the right of independent action must be preserved against coercion. He said:

> The charge made against the railroads in the *Georgia* case is that they combined and conspired to fix rates by coercion. . . . A combination or conspiracy of that kind would not be protected or immunized by S.110.
>
> S.110 does not authorize the Interstate Commerce Commission to approve rate conferences that are used in a conspiracy to fix rates by coercion. . . .
>
> There is nothing in the bill which would prevent issuance of an injunction against coercion . . . whether accomplished by a rate bureau or by any other means. 94 Cong. Rec. 4033-4034 (1948) (extension of remarks); *see* 94 Cong. Rec. 4032 (1948) (extension of remarks).

Senator Reed similarly emphasized that:

> This bill does not give any immunity to any coercive combination. Paragraph 6 leaves such a combination subject to the antitrust laws, just as it is today. 93 Cong. Rec. 6614 (1947).

submitted a brief pointing out that *Keogh* had never applied to suits by competitors even though "bottleneck monopolists" had often tried to use it to bar actions by competitors who had been foreclosed from introducing cheaper and better products and services. The *amici* urged that, if the Court reaffirmed *Koegh*, it should not apply *Keogh* to competitors. And, in a brief authored by counsel for the Chessie system in this case, the *Square D* defendants candidly acknowledged that "courts have viewed competitor cases as distinctly different" from shipper cases.

With this information before it, the *Square D* Court said not less than twelve times that *Keogh* bars suits by *shippers*,[7] but never even *hinted* that *Keogh* bars suits by competitors.

Furthermore, the Court reaffirmed the application of *Keogh* to shippers not because the doctrine was wise, but because it was a long standing part of the "settled legal context" in which Congress had legislated. Congress, said the Court, had long known of but had not changed *Keogh*. 476 U.S. at 423.

Application of *Keogh* to competitors has *not* been part of any settled legal context known to but not changed by Congress. Rather, until the Sixth Circuit's opinion, *all* the law was that *Keogh* did *not* apply to competitors.[8]

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[7] In addition, the Court quoted language from *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), stating that *Keogh* applies to suits by *shippers*.

[8] In support of its *Keogh* ruling the Sixth Circuit urged that the ICC is the sole source of rights for competitors. That argument is remarkably mistaken. As Congress made clear when enacting the Reed-Bulwinkle Act, competitors have rights under the Sherman Act when railroads act outside the immunity granted by Reed-Bulwinkle. In addition this Court and others have ruled that competitors have rights and remedies under the Sherman Act even though they may also have ICC rights and remedies. *See Square D*, *supra*, 476 U.S. at 419-20; *ICC v. American Trucking Associates, Inc.*, 467 U.S. 354, 360 (1984).

That was the settled legal context which Congress long knew of but did not change in regard to application of *Keogh* to competitors.[9]

III. The Sixth Circuit's Decision on Standing Is Unprecedented And Contrary To Decisions of This Court

The chain of transportation for iron ore is interlinked. The defendants thus knew that, if they could destroy competition at one of the links, they would *ipso facto* destroy it at the others. If they could keep out self unloaders, they could keep out private docks because the latter lacked hulett cranes necessary to unload bulkers. Conversely, if they could keep out private docks, they could keep out self unloaders because the latter would have no place to deliver ore. And if they could keep out private docks, they could keep out trucks because the latter were not permitted to pick up ore at railroad docks.

Knowing the interlinked character of the transportation chain, the defendants launched an integrated overall conspiracy directed at *all* the links in order to be sure of totally thwarting all dock and truck competition. Yet the Sixth Circuit ruled that for purposes of standing the conspiracy must be compartmentalized, so that each plaintiff has standing to attack only some of the conspiracy's actions. For example, according to the Sixth Circuit, a dock plaintiff can attack a denial of line haul rates but not the railroads' refusal to handle self-unloaders.

The Sixth Circuit's ruling is remarkable. As far as *amici* are aware, it is the first time any federal appellate

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[9] This is a monopolization and boycott case, not a rate case. But even if it were a rate case, the Sixth Circuit also carried *Keogh* into a situation rarely involved in cases where that doctrine is raised. In the usual *Keogh* case one does not know what the applicable rate would have been if the rate complained of is ruled illegal. But here the rate that would have been applicable is known with exactitude: it is the same commodity line haul rate that was in effect from every one of the defendants' own docks and that was put into effect from petitioner Pinney's dock when the conspiracy partially broke down in 1978.

court has held that injured competitors (who were the announced targets of a conspiracy and often were named in conspiracy meetings and documents) lack antitrust standing to base a suit on all the components of the conspiracy. The Sixth Circuit's ruling also flies in the face of this Court's holding in *Continental Ore* that a plaintiff cannot be forced to attack only parts of a conspiracy:

> [P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '*[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.*' *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). (Emphasis added.)

The Sixth Circuit's decision also conflicts with this Court's ruling in *Blue Shield of Virginia, Inc. v. McCready*, 457 U.S. 465 (1982). There a conspiracy to bar psychologists from insurance reimbursement caused injury to a consumer of psychological services. The consumer was held to have standing because her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." 457 U.S. at 484.

Here actions against self unloaders caused injury to private docks and trucking companies; actions against private docks caused injury to trucking companies; and the injury to each group "was inextricably intertwined with the injury the conspirators sought to inflict" on other groups. Yet the Sixth Circuit has said that no group has standing to assail intertwined actions that were taken against another group but that also harmed the first group. This holding conflicts with *McCready*.

IV. The Sixth Circuit's Decision Nullifies Congress' Intent That the Ratemaking Process Be Open to Public Participation

The defendants' conspiracy was hatched and maintained in secret. Public notice was not given of proposed agreements or of meetings to discuss them. Decisions were reached at secret "informal meetings." Admonitions of confidentiality were issued. The defendants' agreements were never published. Shippers and competitors received no opportunity to comment. The secrecy and lack of notice attending the conspiracy were charged by the government in the criminal case and were set forth in an opinion by the trial judge in this case.

The secrecy and lack of notice were inconsistent with prerequisites for immunity established by Congress. The legislative history of the Reed-Bulwinkle Act makes explicit that a ratemaking process open to participation by the public was a Congressionally ordained condition of immunity.[10]

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[10] Representative Bulwinkle said:

> I read the other day the astonishing statement that 'the bill permitted carriers to get together in secret some dark night.' Needless to say this is absolutely incorrect. *The bill provides for complete publicity at* every conference to protect the rights of the public. 93 Cong. Rec. 3969 (1947) (extension of remarks). (Emphasis added.)
>
> The Senate and House Reports also show Congress' view that rate bureaus must give all interested parties "a full opportunity to be heard" in regard to rate adjustments. Senate Report No. 44, p. 11 (1948); House Report No. 1100, pp. 9-10 (1948). The Reports add that "one of the principal functions" of the rate bureaus "is to serve as media through which the railroads confer with their shippers and consult their wishes and needs before reaching their determinations with respect to rates. . ." *Ibid.*

Finally, Representative Bulwinkle pointed out that the conference method of ratemaking permitted by the bill "furnish[es] a method by which any shipper, small as well as large, can keep track of proposed changes through regularly published dockets listing all

The Sixth Circuit, however, immunized the conspirators from significant liability to injured parties despite the conspiracy's total inconsistency with Congress' requirement of a ratemaking process open to public participation. The Circuit thereby thwarted Congress' intent that an open process be a precondition of immunity.[11]

V. The Sixth Circuit's Opinion Is Inconsistent With Decisions of This Court and Courts of Appeal Regarding The Use of Bottleneck Monopoly Power

The railroads had bottleneck monopoly power at two different levels. They had a monopoly over the business of providing dock services for ore, and monopolies over the business of transporting ore inland to steel mills. This dual bottleneck monopoly was used to prevent market entry at three levels: to forestall self unloaders from carrying ore; to preclude private docks from handling ore; and to preclude trucks from carrying ore inland. The railroads thus used their bottleneck monopolies to stifle technological progress and cheaper prices at three levels and to prevent competition with themselves at the dock and inland transport levels.

The use of bottleneck monopoly power at one or more levels of an industry to bar competition, technological progress and cheaper prices at other levels has become a

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proposals." 94 Cong. Rec. 4033 (1948) (extension of remarks). He also said the conference method of ratemaking provides "a place where any shipper . . . may present his views on proposed changes to all interested carriers." *Id.* at 4033. He and Senator O'Mahoney stressed that small shippers would be at a particular disadvantage in the absence of these procedures. *Id.* at 4033; *see* 94 Cong. Rec. 8414-15 (1948).

[11] The Circuit's proffered justification for thwarting Congress was its statement that Pinney and Litton had waived claims that defendants had not adhered to open procedures. Petitioners' Appendix at 28a. Even if the Circuit's statement regarding waiver is factually accurate, this cannot excuse a federal court from ignoring the explicit intent of Congress.

frequent occurrence in crucial regulated industries such as the telephone, electric power and railroad industries.[12] When such use of bottleneck power has been challenged in antitrust cases, this Court and courts of appeal have regularly made plain that there is neither regulatory immunity nor *Keogh* protection for the use of bottleneck power at one level to bar competition at another level. *See, e.g., Otter Tail, supra*; *Clipper Express, supra*; *City of Kirkland, supra*; *City of Groton, supra*; *Essential Communications, supra.*

In the present case, however, the Sixth Circuit has granted both regulatory immunity and *Keogh* protection to bottleneck monopoly actions by which conspirators used a stranglehold over one level of an industry to obtain an equal stranglehold over a second level, with corresponding stifling of competition, lessening of technological innovation, and higher prices. In so acting the Sixth Circuit has come squarely into conflict, on questions of national economic importance, with the above cited decisions of this Court and courts of appeal.

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[12] *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Litton Systems, Inc. v. AT&T*, 487 F. Supp. 942 (S.D.N.Y. 1980), *aff'd* 700 F.2d 785 (2d Cir.), *cert. denied* 464 U.S. 1073 (1983); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied* 459 U.S. 1170 (1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114 (3d Cir. 1979); *Frontier Enterprises, Inc. v. Amador Stage Lines*, Civil No. S-83-940 MLS (E.D. Cal., October 2, 1985); *Trans-Kentucky Transportation Railroad v. Louisville and Nashville Railroad Co.*, 1983-2 Trade Cases ¶ 65, 476 (E.D. Ky. 1983); *United States v. AT&T*, 461 F. Supp. 1314 (D.D.C. 1978); *Marnell v. United Parcel Service of America*, 260 F. Supp. 391 (N.D. Cal. 1966).

CONCLUSION

For the above reasons, this Court should grant certiorari.[13]

Respectfully submitted,

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[13] Review is warranted even if the Sixth Circuit was correct in ruling that, because petitioners in this case allegedly knew of the conspiracy, the doctrine of fraudulent concealment is inapplicable to them and the federal statute of limitations bars them from recovering under the federal antitrust laws. The Ohio antitrust statute provides that there shall be *no* statute of limitations under the state antitrust laws, and there would therefore be no bar to recovery of double damages under the state laws by petitioners if the Sixth Circuit was wrong in ruling that the defendants' actions are immune under paramount federal regulatory law. In any event, the evidence shows that the *amici* had no knowledge of the conspiracy, which was fraudulently concealed from them. *Amici's* actions, therefore, are not barred by the statute of limitations.